In The

Supreme Court of the United States

October Term, 1976

No. 76-1198

MARY LOUISE McCLUNG,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

ANTHONY F. TROY
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

In The

Supreme Court of the United States

October Term, 1976

No. .....

MARY LOUISE McCLUNG,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The order rejecting the petition for writ of certiorari is set forth in Petitioner's Appendix 1a.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Did the trial court err in sentencing Petitioner on retrial in accordance with the jury's verdict of ten years in the penitentiary when petitioner's first trial resulted in a sentence of only five years in the penitentiary?

2. Does Petitioner have the right to demand a trial by the court without the intervention of a jury?

3. Did the Petitioner's claim of amnesia require the trial court to hold a competency hearing?

STATEMENT OF THE CASE

On November 6, 1976, the petitioner was retried for the murder of Richard Davis. Petitioner requested trial by jury. (Tr. 4). Evidence presented established the petitioner purchased a .38 caliber pistol on April 15, 1972, and received instructions on its use from Melvin E. Mortimer, the store owner, who sold her the pistol. (Tr. 45). Petitioner became proficient in the use of the pistol; the pistol was unloaded when petitioner left the gun shop. (Tr. 45-46).

On the night of May 21, 1972, Marion J. Packett, the next door neighbor of petitioner, heard three shots coming from petitioner's apartment at about 8:00 p.m. (Tr. 52-54). Packett went next door and investigated and encountered petitioner. Petitioner stated to Packett, "May I come in and use your phone. I've just killed a man." Petitioner identified the victim as "my boss . . . he's been harassing me for a long time." Packett observed petitioner's appearance and demeanor. He testified that her clothing appeared neat, no bruises visible and she was not too upset. (Tr. 53).

The police were summoned and Detective Douglas Thomas arrived at the scene, observed Davis' nude body on the upstairs bed in petitioner's apartment, lying face up, with two bullet holes in his left side. (Tr. 58). Petitioner was on the telephone at the time attempting to call her attorney. Thomas advised petitioner of her rights and petitioner told Thomas that the gun was in the closet and offered to show Thomas where it was. (Tr. 59). Thomas observed her appearance as being neat with her hair in a bun, neatly

dressed, no cuts, bruises or any complaint being made by petitioner. (Tr. 60).

Detective Robert Loving arrived shortly thereafter and observed the same neat untrammelled appearance of petitioner. (Tr. 69). Loving located the weapon where petitioner said it would be. (Tr. 71). The weapon was in a linen closet in the hall near the door to the bedroom. (Tr. 71, 85).

Investigation revealed that four shots were fired, two of which caused the death of Davis. (Tr. 79, 120). There was no sign of a struggle in the apartment. (Tr. 88-89). There were no powder burns on the body. (Tr. 120).

The petitioner testified extensively about her long history of visits to psychiatrists, up until 1963. (Tr. 142-148). After the shooting, petitioner was hospitalized and examined by doctors at Towers, located at University of Virginia and by Dr. Blankenship, at Westbrook for evaluations. (Tr. 148-149). She was examined by the psychiatrists for the Commonwealth of Virginia prior to her first trial and found to be sane and capable of standing trial. (Tr. 149, 174). Petitioner claimed loss of memory in her first trial, as well as her second trial. Petitioner was thoroughly examined by the doctors regarding her "amnesia." (Tr. 148, 169-170, 174).

Petitioner testified that Davis was at her apartment when she arrived, that she had broken their marriage engagement, that Davis had abused her in the past mentally and physically and desired abnormal sexual activity when drinking. (Tr. 155-167). Petitioner testified that Davis made demands for sex and pushed her toward the steps leading upstairs. Petitioner struggled with Davis and remembered nothing until she was arrested and sitting in the police car. (Tr. 167-168, 188-189).

Petitioner was examined prior to the second trial by Dr. James Knopp, a psychiatrist. He also heard the peti-

tioner's testimony. (Tr. 211). He testified that it was possible that petitioner had a "disassociated reaction" which was formerly called hysteria, which could possibly be caused by stress, and thus it was possible that petitioner might not remember what happened. He testified that it was possible that petitioner could have amnesia and shot Davis without being aware of it. (Tr. 219-225). Dr. Knopp could only theorize about this occurrence. (Tr. 226).

The jury convicted the petitioner of murder in the second degree and imposed ten years in the penitentiary as punishment. Pursuant to a request by petitioner's attorney, a presentence report was ordered. (Vol. III, Tr. 82).

At the sentencing hearing, the petitioner produced six witnesses, including herself. The court considered that evidence, including the presentence report. (Sentencing Tr. 39). The court entered judgment on the jury verdict and stated that, after considering the record, letters, and witnesses, could find no reason to disturb the jury verdict of ten years. (Sentencing Tr. 49).

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. The Sentence Was Proper

The petitioner assigned as error in the court below that it was error for the trial court to sentence petitioner in accordance with the jury's verdict, which verdict was in excess of the sentence formerly received by petitioner in the first trial for the same offense. Petitioner's assignment of error is based on the fact that the trial court ordered a presentencing hearing and according to petitioner, the court failed to state affirmatively on the record its reasons for imposing the higher sentence.

In 1972, the law in Virginia was that in jury trials, the jury decided guilt or innocence and in guilty verdicts set

the punishment.[1] The trial court was required to pronounce formal judgment on the verdict but had the power to suspend all or part of the sentence imposed.[2] Where trial was by jury, there was no requirement by statute that the judge hear any evidence in mitigation once the jury rendered its verdict.

In the case at bar, petitioner appealed her conviction and

---

[1] § 19.1-291. *Ascertainment of punishment in criminal cases generally when tried by jury.*—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. [Repealed.]

[2] § 53-272. *Suspending sentence and placing on probation.*—After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

In any case wherein a court is authorized to suspend the imposition or execution of sentence, such court may fix the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced.

In case the prisoner has been sentenced and committed to the penitentiary for a felony and the sentence is partially suspended, for purposes of good behavior credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended.

sentence of five years she received at her first trial. In the second trial she received ten years by the jury. There is nothing in the record to indicate that the jury knew the prior sentence imposed in the first trial.

The mandates of *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), have not been violated by the greater sentence imposed on the petitioner in the second trial. Contrary to what petitioner asserts on page ten of her brief, the Court does not ascertain the sentence to be meted out on a finding of guilty by a jury. The court has no power whatever to increase the sentence imposed by the jury. The court can only suspend all or part of it. Thus, the court's discretion is limited within narrow confines.

Pearce holds that on retrial, the court may not impose a greater sentence unless his reasons appear affirmatively on the record. This is to avoid higher sentences based on vindictiveness by the court where a defendant successfully wins a retrial.

In *Chaffin* v. *Stynchcombe,* 412 U.S. 17, 9 S.Ct. 1977, 36 L.Ed.2d 714 (1973), this Court expressly declined to extend the doctrine of *Pearce* to trials by jury:

> The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence. It has been conceded in this case that the jury was not informed of the prior sentence. We have no reason to suspect that this is not customary in a properly tried jury case. It is more likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether that trial was on the same charge, or whether it resulted in a conviction or mistrial.
>
> . . . where improper and prejudicial information regarding the prior sentence is withheld, there is no basis for holding that jury resentencing poses any real threat of vindictiveness. 412 U.S. 26-28.

> The rendition of a higher sentence by a jury upon retrial does not violate the double jeopardy clause. Nor does such a sentence offend the Due Process Clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. The choice occasioned by the possibility of a higher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction. 412 U.S. at 35.

As previously stated, the record does not show that the jury in the second trial knew of the prior sentence. Thus, under *Chaffin,* the jury was free to impose whatever sentence it deemed proper.

The only other question remaining under this issue is whether the court in pronouncing sentence imposed by the jury committed error by not suspending all punishment in excess of that imposed by the jury in the first trial. Since the court's power at the time this case arose was limited to that of approving the sentence imposed by the jury or suspending all or part of the sentence, the court was powerless to act vindictively as proscribed by *Pearce.* The court could not increase the sentence imposed by the second jury. Respondent respectfully submits that the mere approval of the jury verdict by the court did not amount to vindictiveness by the trial court. The Court did not determine the sentence, it only approved the sentence imposed by the jury.

Assuming, but not conceding for the sake of argument only, that the standards delineated by *Pearce* apply to cases where the jury fixes punishment and the court's power is limited to approval of the verdict or suspending all or part of that sentence, the trial court in this case fully complied with this standard.

After the jury returned its verdict, counsel for petitioner

moved the court for a presentencing report. Although the statute in force at that time did not require the court to do so, the court ordered a presentence report.

The record shows that the trial judge listened to six (6) witnesses for the petitioner at the sentencing hearing, (Sentencing Tr. (S.T.) 3-38), four (4) of whom did not testify before the jury. The record also shows that the presentence report was considered by the judge (S.T. 39), and made a part of the record after having been received on December 23, 1975 (S.T. 1-3); that the petitioner had seen it; and in fact supplemented it (S.T. 2); and that she had no objections to it. (S.T. 39).

One witness, Dr. James M. Knopp, stated that the petitioner could not function on the street in a satisfactory manner in all cases (S.T. p. 25), that she had been hospitalized since the first trial and that "she reacted with a rather extreme panic" to some "purely coincidental things" (S.T. p. 26), and that she seemed to feel cornered in the hospital and that she has been acting that way recently." (S.T. p. 26). Likewise, the judge had the opportunity to review the presentence report which indicated that petitioner's father felt petitioner had a violent temper and that she had had it over the years, and that there was a communication problem in getting information for the said report. Additionally, the Probation Officer did not recommend probation.

The information above is information on the record which was considered by the judge, as well as the entire record of the presentence hearing, and which the jury did not hear. It is objective information concerning identifiable conduct on the part of petitioner which occurred after the time of the original sentence proceeding, which was on the record as required by *Pearce*. *Pearce* has been complied with, although Virginia is, in fact, a jury sentencing

state; there is no requirement that respondent knows of which requires a judge to list his justification for a sentence in A, B, C order. The judge's underlying reasons for using his discretion and not varying the ten year sentence are plainly on the record.

The trial judge was not precluded from imposing a greater sentence than that in the original trial of the petitioner. As stated in *Pearce:*

> We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. 395 U.S. 711, 723.

There is no evidence whatsoever, nor did the petitioner allege at any time during the second trial or at the sentence hearing, that the greater sentence handed down by the second jury was imposed to penalize her for exercising her constitutional right to appeal or as a result of the judge's vindictiveness. Increased sentences are far from being rare and the appeal by petitioner was free and voluntary. Vindictiveness played no part in the greater sentence received in the petitioner's second trial.

II. Petitioner Was Not Compelled By The Trial Court Below To Undergo A Trial By Jury.

Petitioner has assigned as error that petitioner attempted to waive a jury trial and proceed to trial by the judge alone and that by the court's refusal to also waive the jury, forced the petitioner to undergo a jury trial and risk a higher sentence. It should be noted in this regard that the law in Virginia requires that in cases where a defendant pleads "not guilty" and seeks trial by the judge alone, the prosecution and the court must also waive the jury.

At the outset, the respondent would point out that there is nothing in the record to indicate that the petitioner ever

requested a trial by the judge alone. On the contrary, the *petitioner specifically requested trial by jury.* (Tr. 4). Accordingly, respondent submits that this allegation is totally without merit.

Whether the petitioner has the right to demand a trial by the court sitting without a jury has been decided by this Court in *Singer* v. *United States,* 380 U.S. 24:

> . . . Trial by jury has been established by the Constitution as the "normal and . . . preferable mode of disposing of issues of fact in criminal cases.
>
> . . . In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. 380 U.S. at 35-36.

III. The Trial Court Was Not Required To Hold A Competency Hearing On Learning Of Petitioner's Claim Of Amnesia.

Petitioner has alleged that where one suffering from amnesia and other symptoms or behavior which cast doubt on defendant's competency to stand trial, and where this fact is made known to the trial court, that the court is required to conduct a competency hearing as prescribed in *Pate* v. *Robinson,* 383 U.S. 375, 86 S.Ct. 836, 151 S.E.2d 815 (1966) and *Drope* v. *Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

The factual situation in *Robinson* and *Drope* are important to the issue raised in this case.

In *Robinson,* the defendant was convicted of murder and sentenced to life in prison. He had failed to demand a hearing as to his competency to stand trial. His counsel contended throughout the trial that defendant was insane at the time of the offense and at the time of trial. The Court in *Robinson* reviewed the factual situation extensively. The conduct of the defendant was highly indicative of mental impairment. See 383 U.S. at 378-384. There was evidence from many witnesses, which, if believed, would tend to show that the defendant was insane both at the time of the crime and at the time of trial.

In *Drope,* counsel for defendant filed a motion for a continuance in order to obtain a psychiatric examination for defendant, however, no examination was ever made, partially through neglect of defendant's counsel.

The defendant went to trial and testimony from the complaining witness (defendant's wife) indicated mental instability (and possibly insanity). During the trial, defendant shot himself. The trial proceeded in absence of defendant who was in the hospital. Defendant moved for a new trial and testified about why he was absent. In a later motion, evidence was heard from two psychiatrists who testified that, under the factual situation described, the defendant might not have been competent to stand trial.

This Court held that the factual situation, considering the defendant's behavior and other testimony presented, created sufficient doubt of his competence to stand trial and required further inquiry. The fact that the lower court held no hearing was error.

It is pointed out by respondent that *Drope* enunciated the rule concerning competency to stand trial:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial. . . .
>
> Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." 420 U.S. at 171, 172.

In the case at bar, petitioner's allegation that because there was some evidence that petitioner may be suffering from amnesia, that the trial court committed error in its failure to hold a hearing. Memory loss complained of by a defendant has always been a convenient defense. Where the factual situation is so strongly against a defendant, lack of memory of what happened is better in some cases than either lying or telling the truth.

The factual situation in this case overwhelmingly proves the guilt of the petitioner. Petitioner had been having trouble with her deceased lover. A few weeks before the murder, she purchased a pistol and became proficient in its use. She and the deceased were alone in her apartment. Four shots were fired from her pistol, two of which were fatal to the deceased. The deceased was found on her bed, nude, the body not having been moved since the shooting. There were no powder burns on the body indicating that some distance separated the deceased from the murder weapon. Petitioner, minutes later appeared to a neighbor neatly dressed, hair neatly placed, untrammelled in appearance and not too upset. Petitioner admitted shooting her boss, and made no complaint about being attacked. The pistol was found outside the room where the body was found, in a

closet which opens into the room where the murder took place. There was no sign of a struggle.

Faced with this kind of evidence, there was no defense readily available to show 1) accident, 2) justification, 3) self-defense or other defense. Quite shrewdly, petitioner feigned loss of memory.

The petitioner has alleged that the trial court should have had a hearing on competency once petitioner alleged amnesia. This contention is without merit because petitioner presented evidence at the trial which tended to show that she was not an amnesiac. Neither *Robinson* nor *Drope* require such hearing on this allegation.

The record of trial reveals that Dr. James M. Knopp, a psychiatrist who had seen petitioner over a long period of time, and heard petitioner testify, testified concerning petitioner's mental condition. (Tr. 208-232). Dr. Knopp testified that petitioner had some mental problems and that it was possible that the shooting *could* have occurred while petitioner was suffering from a "disassociated reaction." He described a "disassociated reaction" as being a situation similar to one where the person is under hypnosis. A person suffering from this would, naturally, not be aware of doing the act in question, or remember what happened at a later date. (Tr. 219-220).

In effect, Dr. Knopp had given results of his examination which was considered by the Court and jury. Respondent submits that the issue raised by petitioner, that the trial court erred in not having a hearing to determine competence, is mooted by this testimony. Whether the petitioner suffered from a disassociated reaction (and amnesia) became an issue of fact to be decided by the jury which was resolved against the petitioner. The Court even instructed the jury on this. (Tr. Vol. 3, pp. 8-9). The jury rejected this evidence, which was proper in light of the Commonwealth's evidence.

Even though there was an examination of the petitioner and testimony concerning petitioner's amnesia, the respondents submit that neither *Robinson* nor *Drope* require the trial court to inquire into the competency of an accused on the bald assertion that the accused is suffering from amnesia and cannot remember what happened at the time the crime was committed.

Where a defendant is charged with a crime and pleads amnesia, how would the state ever bring a defendant to trial? Amnesia alone has not been a basis for finding that an accused was incompetent to stand trial. Moreover, petitioner testified extensively about her prior medical history, her relationship with Davis, the events leading up to the shooting, and the events subsequent to the shooting. She had the presence of mind to call her attorney after the shooting. Petitioner was examined and found competent to stand trial prior to her first trial and there was no evidence to indicate her condition had changed at the second trial.

Respondent has been unable to find any cases decided by this Court on the issue of whether a complaint of amnesia by a defendant is grounds for a finding of incompetency to stand trial. However, numerous United States Circuit Courts of Appeals have held that amnesia alone is not sufficient grounds for a finding of incompetency to stand trial.

In *United States* v. *Knohl,* 379 F.2d 427, *cert. denied,* 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (2nd Cir. 1967), the Court held:

> Where the defendant complains of nothing more than memory difficulties, there is inadequate ground for holding an accused incompetent to stand trial. 379 F.2d 436.

In *United States* v. *Stevens,* 461 F.2d 317 (7th Cir. 1972), the Court held that amnesia was not a bar to an otherwise competent defendant and a competency hearing was not

required where the only basis for incompetency was inability of the defendant to recall events at the time of the crime. See also *United States* v. *Hearst,* 412 F.Supp. 858 (1975); *United States* v. *Sullivan,* 406 F.2d 180 (2nd Cir. 1969); *Daemers* v. *State of Minnesota,* 456 F.2d 1291 (8th Cir. 1972); *United States* v. *Borum,* 464 F.2d 896 (2nd Cir. 1972); *United States* v. *Cowan,* 472 F.2d 1206 (6th Cir. 1972); *United States* v. *Ring,* 513 F.2d 1001 (6th Cir. 1975).

The respondent respectfully submits that the petitioner was fully competent to stand trial in spite of her claim of amnesia. The evidence produced by the Commonwealth establishes petitioner's guilt beyond any reasonable doubt. It is submitted that even if the petitioner had testified to being attacked by the deceased and the killing was in self defense, that testimony would have been rejected as incredible in light of the physical evidence and testimony of impartial witnesses.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

ANTHONY F. TROY
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States and on the 17th day of May, 1977, I mailed with first class postage prepaid, a true copy of this Respondent's Brief in Opposition to Grant of Certiorari to Phillip J. Hirschkop and Leonard S. Rubenstein, 108 North Columbus Street, Post Office Box 1226, Alexandria, Virginia 22313.

JAMES E. KULP

Assistant Attorney General